Supreme Court, U.S.
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No. 02-1226

IN THE

Supreme Court of the United States

WILLIAM O. SCHISM and ROBERT L. REINLIE,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONERS' REPLY MEMORANDUM

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In this Reply Memorandum, Petitioners wish to make only brief comments concerning new matter that Respondent has raised in its "Brief for the United States in Opposition" to the Petition for Certiorari.

1. The United States argues that the existence of an express enlistment contract between Petitioners and Respondent further bolsters the government's argument that *Bell v. United States*, 366 U.S. 393 (1961) is controlling.[1] That argument is mistaken because, *inter alia*, the trial judge met and disposed of it in the following manner:

> The [United States] also argue[s] that the plaintiffs' enlistment agreements override any alleged implied-in-fact contract between the government and the plaintiffs. * * * *The enlistment agreements signed by the plaintiffs say nothing about retirement benefits.* It is true that an "implied-in-fact contract cannot exist if an express contract already coves the same subject matter. . . ." *However, the enlistment agreements signed by the plaintiffs do not cover the subject matter at issue here—that is, health benefits for retirees.*[2]

It is noteworthy that the United States did not challenge this finding of fact by the trial judge, either before the court of appeals panel or in the *en banc* proceeding. Only now, in its Brief in Opposition to the Petition for Certiorari, does the United States attempt to impugn the trial judge's finding of fact. Yet, as he held, enlistment/reenlistment contracts,

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[1] The Army had raised the "express contract" defense against Korean War deserter Bell, but the Court rejected that argument. It found that because there was a specific statute that governed prisoner of war pay, that statute would govern. Thus, the Court denied the United States' claim that there existed an express contract with POWs in general and with Bell in particular. Clearly, then, the *Bell* case fails to provide the United States with any support on its "express contract" argument, because *Bell*, in finding no express contract, holds the precise opposite.

[2] Petition, App. 119a-120a. Emphasis added.

express or implied, have nothing to do with this case—nor with the free lifetime medical care the government offered.[3]

2. Moreover, were the United States correct in its assertion that the court of appeals *held* "that, even if petitioners' implied-in-fact contract claim were cognizable, and even if recruiters had authority to promise free and unconditional lifetime medical benefits, petitioners' written [recruitment] agreements foreclosed their implied-in-fact contract claims," clearly such a holding would have created *yet another exception* to the Little Tucker Act, which would further support Petitioners' contention that Certiorari should be granted.

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[3] Also arguing against any relevance to the Petition, of the United States' "express contract" point, is the nature of the proceedings below, where not only did the district judge find that enlistment/reenlistment contracts had nothing to do with the issues presented by the complaint, but where, according to the *en banc* opinion, "The district court concluded that because no statute authorized these promises, no valid contract was formed between the government and plaintiffs . . . ." (Petition, App. 2a). In other words, the case in the district court, before the court of appeals panel, and in the *en banc* proceeding, was about *authority*. As the *en banc* majority put it: "The principal question before us is whether the promises made to the plaintiffs . . . were within the *authority* of the Air Force Secretary under 5 U.S.C. Section 301." (Petition, App. 3a; emphasis added). Finally, it was the district court's grant of summary judgment for the United States that the *en banc* affirmed, and that judgment—in rejecting any "express contract" argument—rested entirely on the lack of statutory authority. The *en banc* opinion's last sentence—"Accordingly, the retirees' contract claim is foreclosed because an implied-in-fact contract cannot exist if an express contract already covers the same subject matter" (Petition, App. 30a)—if not *dicta*, is merely another way of saying that the Little Tucker Act does not apply to *any* benefits claim arising out of *any* term of *any* enlistment/reenlistment contract because in every case of a military person there will always necessarily be such a contract. And that anomaly is what this Petition for Certiorari seeks to resolve: *does the Little Tucker Act exclude from its reach any claim arising from military contracts?*

Indeed, in reiterating the notion that *Bell* created an exception to the Little Tucker Act,[4] the United States simply underscores the existence and importance of the first question presented by the Petition for Certiorari—namely, whether such a *Bell* exception to the Little Tucker Act does and should exist.

3. Central to the Petition is the question of statutory authority under 5 U.S.C. Section 301. The lengthy discussion by the United States in Part 2 of its Brief simply underscores the importance of the yet-to-be-decided question of Section 301's substantive content.[5]

4. The United States brings a new argument to the table:[6] the "Angels," (Department of Defense [DOD] and Congress) had some special legislative sympathy and sensitivity to these aged Petitioners (one recently deceased at age 78, and the other seriously ill at age 82), and thus generously renewed and expanded retired veterans military care benefits. The United States implies that a benevolent DOD brought "Tri-Care for Life (2000)" into being to respond to the retired military medical needs of the Petitioners and their countless colleagues. Nothing could be further from the truth! Far from being an "Angel," DOD was in fact the "Devil" who opposed at every turn the reinstitution and return of free medical care for the Petitioners. DOD claimed that a return to "free lifetime medical care" for retirees was going to interfere with and destroy the "active duty medical care scheme." When Petitioners sued their government over this loss of medical care, other retirees and military associations

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[4] *See* pages 15-16 of the United States' Brief in Opposition.

[5] Chief Judge Mayer and the three member panel had found that 5 U.S.C. Section 301, and the statutes directing that the military secretaries' primary duty of "recruiting" (10 U.S.C. Sections 3013, 5013, 8013), clearly provided legal authority for their secretaries decades-long offers (and *acknowledged* promises) of free lifetime medical care, especially since there was no statute that prohibited the offers (See, *United States* v. *Winstar Corporation, et al.*, 518 U.S. 839 (1996)).

[6] Brief in Opposition, 6-9.

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commenced assailing the Congress over the loss of benefits, and DOD forced some "band-aid" fixes on Congress, which created some low-dollar "baby step" palliative programs of "free care," mostly in the boondocks of America where a minimal numbers of retirees would be affect and the cost would be low. With no change in sight.

It was specifically the indignant rabble-rousing outrage of Petitioner Robert L. Reinlie—in a 1988 meeting of hundreds of retired veterans in Laurel, Mississippi—that persuaded Congressman Ronnie Shows (D. Miss.), who was in attendance, to file and sponsor the "Keep the Promises to WW II/Korean Veterans Bill," which became the Floyd Spence National Defense Act 2001 (Pub.L.No.106-398, Sec. 712).[7] DOD continued its' opposition to this bill until it became obvious that the Senate-sponsored version of Keep the Promises was going to be passed and signed by the President in 2000.

The battle damage caused by DOD's TriCare bill (kicking the elderly veterans out of military hospitals) was significant. Only *one* branch of the military services was able to meet their recruiting goals in 1998 and 1999, because the retired veteran grandfathers were telling their grandchildren *not* to enlist in the military services, because the United States government could not be trusted to fulfill its promises.

Thus, far from being the helper "Angel" to the World War II "Greatest Generation" and their Korean War peers, the Department of Defense was the very "Devil" who wreaked havoc on elderly retired military members, forcing them to purchase their own medical care, after having been promised and provided free care for decades. Further, it was not the Congress who concocted this "elderly abuse," but rather DOD. Congress had continued funding "free" care for the 65 year old veterans, until DOD's TriCare exception eliminated

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[7] The bill was renamed after the death of war veterans advocate Representative Spence, in his honor

them in 1996. As soon as Congress recognized the damage that had been done to the elderly veterans and the honor of the nation, they passed the TriCare for Life for the Petitioners and others, with the words of Rudyard Kipling ringing in their ears:

> For it's Tommy this, an' Tommy that, an' "Chuck him out, the brute"! But it's 'Saviour of 'is country' when the guns begin to shoot[8]

Thus, it was DOD's TriCare amendment in 1995 which breached this decades old contract with the Petitioners, and casting the Devil as the Angel, flies in the face of reality.

5. Lastly, *Winstar*, *supra*, was an-implied-in-fact contract case that overtook all of the old cases cited by the United States. It applied common law principles to contracts between the United States and the public. The United States erroneously argues, in effect, that the 1961 *Bell* case, *supra,* somehow overules *Winstar,* decided some forty-five years later.

In sum, the United States' Brief in Opposition seem to misunderstand the questions asked in the Petition: (1) Does this Court's *Bell* decision, in effect, amend the Little Tucker Act, and (2) Does 5 U.S.C. Section 301 provide statutory authority for the recruiters' offers, because that section grants substantive powers?

The United States' Brief in Opposition underscores the need for these questions to be answered.

Respectfully submitted

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[8] Petition, App. 70a.